

**SPIEGEL & MCDIARMID LLP**

1333 NEW HAMPSHIRE AVENUE, NW  
WASHINGTON, DC 20036

TELEPHONE 202.879.4000

FACSIMILE 202.393.2866

DIRECT DIAL 202.879.4022

EMAIL TIM.LAY@SPIEGELMCD.COM

**MEMORANDUM**

**TO:** 2009 NLC Congressional City Conference Attendees  
**FROM:** Tillman Lay  
**DATE:** February 27, 2009  
**SUBJECT:** Broadband-Related Provisions of the American Recovery and Reinvestment Act of 2009

---

**TABLE OF CONTENTS**

INTRODUCTION .....	2
I. THE NEW NTIA “BTOP” BROADBAND GRANT PROGRAM.....	3
A. Appropriated Amounts. ....	3
B. Purposes of BTOP. ....	4
C. Timing of Grants and Project Completion.....	6
D. Grant Eligibility.....	6
E. Types of Projects Eligible for Grants. ....	7
F. Criteria for Awarding Grants. ....	8
G. NTIA May Consult with the States. ....	10
H. Open Access/Net Neutrality.....	10
I. National Broadband Plan. ....	11
J. Broadband Mapping. ....	12
K. NTIA Implementation and Timing.....	13
II. THE NEW RUS BROADBAND GRANT PROGRAM. ....	13
A. Appropriated Amounts. ....	13
B. Criteria for RUS Broadband Grants and Loans. ....	14
III. MUNICIPAL BOND AND OTHER POTENTIALLY BROADBAND-RELATED PROVISIONS IN THE ARRA.....	17
A. Municipal Financing Provisions.....	17
B. Smart Grid Grants.....	19
CONCLUSION .....	19

## **INTRODUCTION**

As you are aware, on February 17 President Obama signed into law the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA"), otherwise known as the "Stimulus bill." The ARRA contains a wide variety of provisions that will impact municipalities and their utilities, ranging from a host of energy-related and wastewater provisions, to aid to state and local governments. This memorandum, however, focuses only on the broadband-related provisions of the ARRA.

Part I summarizes key aspects of the ARRA's new "Broadband Technology Opportunities Program" ("BTOP"), to be administered by the Commerce Department's National Telecommunications and Information Administration ("NTIA"), in consultation with the FCC. Our focus will primarily be on the broadband grant aspects of the BTOP.

Part II highlights the broadband grant aspects of the "Distance Learning, Telemedicine, and Broadband Program" created by the ARRA that is to be administered by the Agriculture Department's Rural Utilities Service ("RUS") branch.

Part III briefly outlines the ARRA's municipal finance and bond provisions that would apply to broadband-related bonds, as well as the ARRA's smart grid grant program.

Before turning to those topics, we first point out the guiding principles that will govern *all* funds expended under the ARRA (including, of course, all broadband-related funds). Section 3 of the ARRA provides:

- (a) Statement of Purposes. – The purposes of this Act including the following:
  - (1) To preserve and create jobs and promote economic recovery.

- (2) To assist those most impacted by the recession.
  - (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.
  - (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
  - (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.
- (b) General Principles Concerning Use of Funds. – The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the purposes specified in subsection (a), including commencing expenditures and activities as quickly as possible consistent with prudent management.<sup>1</sup>

In general, the ARRA requires construction activities performed in whole or in part with monies from the ARRA to commence and be completed promptly, and the federal government's authority to commit money under the ARRA expires at the September 30 end of the fiscal year (usually September 30, 2010 or 2011, depending on the type of project).

## **I. THE NEW NTIA "BTOP" BROADBAND GRANT PROGRAM.**

### **A. Appropriated Amounts.**

The ARRA appropriates \$4.7 billion for the NTIA's new BTOP program.<sup>2</sup> Of this total, at least \$4.35 billion must be spent pursuant to the BTOP grant provisions, with the following "earmarks"<sup>3</sup> on that \$4.35 billion: (1) not less than \$200 million on competitive grants "for expanding public computer center capacity, including at community colleges and public

---

<sup>1</sup> ARRA, § 3, 155 Cong. Rec. H1307, H1308 (daily ed. Feb. 12, 2009). This memorandum will cite to the February 12, 2009, Congressional Record publication of the text of the ARRA and the accompanying Conference Report on H.R. 1.

<sup>2</sup> ARRA, § 5, Div. A, Title II, 155 Cong. Rec. at H1311.

<sup>3</sup> The term "earmark" is not intended literally or to be pejorative.

libraries,” (2) not less than \$250 million on competitive grants “for innovative programs to encourage sustainable adoption of broadband service,”<sup>4</sup> (3) \$10 million for auditing and oversight of the BTOP program, (4) up to \$350 million for “developing and maintaining a broadband inventory map” pursuant to the Broadband Data Improvement Act (“BDIA”) that Congress enacted last fall,<sup>5</sup> (5) the NTIA may transfer an amount it determines necessary to the FCC to fund the FCC’s development of a national broadband plan within a year of the ARRA’s enactment, and (6) no more than 3% of the total amount appropriated may be spent on administrative costs.<sup>6</sup>

The net effect of these “earmarks” on the \$4.35 billion in broadband-related grant funds is that somewhere between \$3.7 billion and \$3.8 billion is likely to be available for grants for actual broadband system construction and deployment.

B. Purposes of BTOP.

The stated purposes of the NTIA’s BTOP are as follows:

- 1) To provide access to broadband to unserved areas.
- 2) To provide improved access to broadband to underserved areas.
- 3) To provide broadband education, awareness, training, access, equipment and support to:
  - (a) schools, libraries, medical and healthcare providers, institutions of higher learning and other community support organizations;

---

<sup>4</sup> You can expect Connected Nation and its subsidiaries (collectively, “CN”) to be heavy bidders for these grants, as CN had repeatedly touted the “demand stimulation” benefits of its activities.

<sup>5</sup> Pub. L. No. 110-385 (47 U.S.C. § 1301 note). Again, you can expect CN to be a major bidder for these funds. The BDIA also, however, makes states and their agencies and political subdivisions eligible for these broadband mapping grants.

<sup>6</sup> ARRA, § 5, Div. A, Title II, 155 Cong. Rec. at H1311.

- (b) organizations and agencies that provide community outreach to encourage greater broadband use by low-income, unemployed, aged and other vulnerable populations; and
  - (c) “job-creating strategic facilities” in State-designated economic zones, Economic Development Districts designated by the Commerce Department, Renewal Community or Empowerment Zones designated by HUD, or Enterprise Communities designated by the Agriculture Department.
- 4) To improve access to and use of broadband by public safety agencies.
  - 5) To stimulate broadband demand, economic growth and job creation.<sup>7</sup>

These purposes are, of course, broad and to a degree overlapping. Some, such as goals (1) and (2), pretty clearly relate to the broadband deployment grant aspects of BTOP, while others, such as goals (3) and (5), would seem to relate more to the broadband education and demand stimulation aspects of BTOP. Goal (4) – improving broadband access and use by public safety agencies – arguably has implications for all aspects of BTOP, and likely widens the scope of potential broadband deployment grant applicants to include all state and local public safety agencies.

---

<sup>7</sup> ARRA, § 2, Div. B, Title VI, § 6001(b), 155 Cong. Rec. At H1411.

C. Timing of Grants and Project Completion.

NTIA must make all grant awards before the end of fiscal year 2010 (*i.e.*, by September 30, 2010), and all grantees must substantially complete their projects no later than two years following award of a grant.<sup>8</sup>

D. Grant Eligibility.

Unlike the House and Senate bills, the ARRA as enacted not only includes states, political subdivisions, territories, Native American tribes, public-private partnerships, and non-profits as entities eligible for BTOP grants, but also “any other entity, including a [private] broadband service or infrastructure provider,” as the NTIA determines by rule.<sup>9</sup> This expansion of eligible grant recipients to the private sector will, of course, greatly multiply the universe of potential grant applicants. It also therefore poses the risk of domination of the BTOP grant program by incumbent providers, which have the resources to blanket the grant application process and better access to capital to quickly fund their portion of the project on which they bid.

As noted below in Parts I(F) and (H) below, the criteria that NTIA is to use in granting applications will ameliorate this danger of private incumbent industry dominance. The degree of amelioration, however, is hard to predict given the flexibility of those criteria, at least until or unless the NTIA fleshes out those criteria in a rulemaking.

Among the other eligibility requirements are that the applicant must (1) submit a complete and timely application, (2) provide “a detailed explanation” of how the funds will be used to carry out the BTOP’s purposes expeditiously, including a showing that the project would

---

<sup>8</sup> *Id.* at § 6001(d)(2) & (3).

<sup>9</sup> *Id.* at § 6001(e)(1)(C).

not have been implemented during the grant period without BTOP assistance,<sup>10</sup> (3) demonstrate that the applicant is capable of carrying out the project, (4) demonstrate that the applicant will appropriate or otherwise unconditionally obligate sufficient funds to satisfy the 20% matching requirement,<sup>11</sup> and (5) disclose the source and amount of any federal or state funds outside of BTOP that the applicant receives or has applied for relating to the project.<sup>12</sup>

E. Types of Projects Eligible for Grants.

The ARRA authorizes NTIA to award competitive grants under BTOP to:

- 1) acquire equipment, networking capability, hardware and software, digital network technology, and infrastructure for broadband services,
- 2) construct and deploy broadband service infrastructure,
- 3) ensure access to broadband service by community anchor institutions,
- 4) facilitate access to broadband service by low income, unemployed, aged and otherwise vulnerable populations to provide educational and employment opportunities to members of those populations, and
- 5) construct and deploy broadband facilities that will improve public safety broadband communications services.<sup>13</sup>

You will see an overlap between this list and the BTOP “purposes” list in Part I(B) above, and you will also note that, as with those purposes, this list of types of projects eligible

---

<sup>10</sup> This latter showing is designed largely to avoid funding of broadband projects already planned by incumbent providers that would have occurred even without BTOP. This is consistent with the ARRA’s overall purpose: To promote spending and investment that would not otherwise have occurred.

<sup>11</sup> ARRA, § 2, Div. B, Title VI, § 6001(f), requires that the federal share of any project funded by BTOP not exceed 80%, unless NTIA grants a waiver based on “demonstrate[d] financial need.”

<sup>12</sup> *Id.* at §§ 6001(e)(2)-(6).

<sup>13</sup> *Id.* at § 6001(g)(1)-(5).

for grants is broad and flexible. The result is that, at least pending further clarification in an NTIA rulemaking on BTOP, the potential range of projects for which applications can be made is quite broad. For instance, beyond the deployment of end-user broadband networks by municipal utilities, public-private partnerships, and private providers, the list suggests the applications by municipalities to build or expand broadband public safety networks, and applications for more limited-scope broadband networks connecting only “community anchor institutions,”<sup>14</sup> would be appropriate. Although “community anchor institutions” is not defined, it likely means state, city and/or county government buildings, hospitals and medical centers, colleges and universities, and perhaps anchor employers in the community.

F. Criteria for Awarding Grants.

The list of criteria that the NTIA will use to award BTOP grants is relatively short, but also broadly worded and thus also quite flexible. “To the extent practical,” the NTIA will:

- 1) award at least one grant in every “State.”<sup>15</sup>
- 2) consider whether the applicant is a socially and economically disadvantaged small business concern as defined in the Small Business Act, 15 U.S.C. § 637.
- 3) favorably evaluate applications that will deploy infrastructure in an area that will, if approved –
  - a) increase the affordability of, and subscribership to, service to the greatest population of users in the area;

---

<sup>14</sup> *Id.* at § 6001(g)(3).

<sup>15</sup> The ARRA is ambiguous as to whether this reference to “State” means only the 50 states or refers also to the District of Columbia, the territories and Native American tribal lands. *See id.* at § 6001(e)(1)(A). In any event, the NTIA would retain discretion to define “States” in this broad manner or, alternatively, to follow a policy of awarding at least one grant to each of the more broadly defined “States” if it wishes.



- b) provide the greatest broadband speed possible to the greatest population of users in the area;
- c) enhance service for healthcare delivery, education, or children to the greatest population of users in the area; and
- d) *not* result in unjust enrichment as a result of support for non-recurring costs through another federal program for service in the area.<sup>16</sup>

The key comparative criteria for evaluating grant applications are, of course, those set forth in (3)(a)-(d) above. These criteria are most noteworthy for being broad and flexible and for not being absolute. That is, the language affords no guidance on how much relative weight the NTIA is to give to each criterion or, perhaps more interestingly, on how the NTIA is to weigh different, and sometimes competing, factors within a criterion. For instance, in criterion (3)(b) above, what is the balance between on the one hand, deploying service more widely but at a lower data speed, versus deploying not as widely but at a higher speed? Similarly, with respect to criterion (3)(a) above, in maximizing both affordability and subscribership to the greatest population, which gets the upper hand: deploying broadband to unserved areas (thereby increasing the population served) or deploying competitive, and higher-speed, broadband to underserved areas (thereby increasing affordability to the greatest population)?

The NTIA rulemaking will likely provide further guidance on these questions, but we suspect that any such clarification would still leave the criteria intentionally flexible. That would

---

<sup>16</sup> ARRA, § 2, Div. B, Title VI, § 6001(h), 155 Cong. Rec. at H1411. Factor (d) appears intended at least in part to prevent rural telephone carriers from double-dipping through use of BTOP grant funds and the federal Universal Service Fund (“USF”). This criterion will be an obstacle for many rural local exchange carriers (“RLECs”), most of which are USF recipients. As a result, most RLECs are likely to find the separate RUS broadband grant program more attractive. *See* Part II below.

make the NTIA's job of evaluating the resulting "apples and oranges" applications much more difficult, but it also would give the NTIA far greater discretion in determining which applications to grant.

G. NTIA May Consult with the States.

The ARRA provides that NTIA may consult with a State, the District of Columbia, or a territory or possession of the United States with respect to (1) identifying unserved and underserved areas in the State, and (2) the allocation of grant funds within the State.<sup>17</sup>

This likely means that NTIA will be seeking and/or will receive input from every State – most likely governors' offices but possibly state PUCs as well – both in fleshing out the rules for the grant application process and thereafter in evaluating applications received. We therefore strongly encourage potential applicants to contact and do everything you can to work with your governor's office to try to persuade your governor of the desirability of your application.

H. Open Access/Net Neutrality.

The BTOP also contains what might be called a "net neutrality" requirement of sorts. The ARRA requires NTIA, in coordination with the FCC, to

publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under [the BTOP], including, at a minimum, adherence to the principles contained in the [FCC's Aug. 5, 2005, *Broadband Policy Statement*, FCC 05-15].<sup>18</sup>

Much will depend on whether the NTIA and the FCC decide to impose more vigorous network nondiscrimination obligations on BTOP grant awardees than the FCC's 2005 *Broadband Policy Statement*. If they do, then that may well disqualify some incumbent

---

<sup>17</sup> ARRA, § 2, Div. B, Title VI, § 6001(c), 115 Cong. Rec. at H1411.

<sup>18</sup> *Id.* at § 6001(j).

providers from receiving grants and open the door to greater chances of success for municipal broadband and other new entrant grant applicants. If, on the other hand, the NTIA and the FCC stick with only the FCC's 2005 *Broadband Policy Statement*, incumbent telephone companies and cable operators will likely find the grant application process more appealing and be more likely to file more grant applications.

I. National Broadband Plan.

Within a year after the ARRA's enactment (*i.e.*, February 17, 2010), the FCC is required to submit to the Senate and House Commerce Committees a national broadband plan that (1) seeks to ensure that all people in the U.S. have access to broadband and establishes benchmarks for meeting that goal, (2) analyzes the most effective and efficient mechanisms for ensuring broadband access by all people in the U.S., (3) sets forth a detailed strategy for achieving affordable broadband service and maximizes broadband infrastructure use and service by the public, (4) evaluates the status of broadband deployment, including the progress of projects supported by BTOP grants, and (5) sets forth a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, healthcare delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth.<sup>19</sup>

In developing the national broadband plan, the FCC is given access to the data provided to other government agencies under the BDIA.<sup>20</sup> This is the data that is to be gathered by states

---

<sup>19</sup> ARRA, § 2, Div. B, Title VI, §§ 6001(k)(1)-(2), 155 Cong. Rec. at H1411-1412.

<sup>20</sup> *Id.* at § 6001(k)(3), 155 Cong. Rec. at H1412.

or other entities through BDIA grants awarded by NTIA, as well as any other data gathered by NTIA itself.

J. Broadband Mapping.

The ARRA requires NTIA to develop and maintain a “comprehensive nationwide inventory map of existing broadband service capability and availability” in the U.S. that “depicts the geographic extent to which broadband service capability is deployed and available from a commercial or public provider throughout each State.”<sup>21</sup> Within two years of the date of enactment (*i.e.*, February 17, 2011), NTIA must make the nationwide broadband map available to the public at the NTIA’s website in a form that is interactive and searchable. *Id.*

The interplay between this broadband mapping requirement and the BDIA’s state-by-state grant funding of mapping is not clearly stated in the ARRA. Given that the ARRA requires NTIA to fund the BDIA broadband mapping grant program, however, it seems likely that NTIA will rely, to a very significant extent on the state-by-state mapping that results from the grants awarded under the BDIA to develop the nationwide broadband map. In addition, NTIA may, under the ARRA, contract out much, if not all, of its overall broadband data mapping responsibilities.

This arrangement strongly suggests that CN will seek to play a major role in, and likely have an inside track to receive funding for, much of the broadband mapping work required by the ARRA.

---

<sup>21</sup> *Id.* at § 6001(l).

K. NTIA Implementation and Timing.

The ARRA gives the NTIA authority to develop any rules necessary to carry out the BTOP. The NTIA has already announced that it will begin meetings with interested parties to develop such rules beginning March 2.<sup>22</sup>

The ARRA leaves many gaps in BTOP for the NTIA to fill. Among the many gaps that the NTIA might seek to fill in are clarifying the eligibility and application comparison criteria (*see* Parts I(B) & (D)-(F) above). The ARRA does not define what is meant by “unserved” and “underserved” areas. The Conference Report, however, instructs NTIA to coordinate with the FCC in defining those terms.<sup>23</sup>

NTIA will, of course, also need to develop application forms and set deadlines for application filing. You can expect that process to move quickly, as the ARRA requires NTIA to report on its progress within three months of ARRA enactment (*i.e.*, by May 17, 2009) and every 90 days thereafter, and it also requires NTIA to award all grants before the end of fiscal year 2010 (*i.e.*, by September 30, 2010).<sup>24</sup>

II. THE NEW RUS BROADBAND GRANT PROGRAM.

A. Appropriated Amounts.

The ARRA appropriates \$2.5 billion to the Agriculture Department for “grants, loans and loan guarantees, for broadband infrastructure in any area of the United States.”<sup>25</sup>

---

<sup>22</sup> Notice: Broadband Grant Programs Meetings, 74 Fed. Reg. 8233 (Feb. 24, 2009).

<sup>23</sup> Conference Report, 155 Cong. Rec. at H1514.

<sup>24</sup> ARRA, § 2, Div. B, Title VI, §§ 6001(d)(4) & (d)(2), 155 Cong. Rec. at H1411.

<sup>25</sup> ARRA, § 5, Div. A, Title I, 155 Cong. Rec. at H1308.

B. Criteria for RUS Broadband Grants and Loans.

The ARRA sets forth several criteria to guide RUS in awarding broadband grants and loans.<sup>26</sup>

1. At least 75% of the area to be served by a project receiving RUS broadband grants or loans must be in a rural area without sufficient access to high speed broadband services to facilitate economic development.
2. Priority will be given to project applications for broadband systems that will deliver end users a choice of more than one provider. This criterion favors new competitive broadband service providers in a given area, and thus would appear to provide municipal broadband applicants with an advantage over incumbent telephone and cable company applicants. Alternatively, this criterion could be construed as a weak “net neutrality” provision, giving preference to wholesale broadband systems that have multiple retail service providers. But that, too, should favor new entrants like municipal broadband providers over incumbents.
3. Priority will be given to applications for projects that provide service to the highest proportion of rural residents that do not have access to broadband service. This criterion could benefit competitive municipal broadband systems in rural areas, but it also could cut the other way, rewarding incumbent telephone and cable companies in rural areas that seek grants to extend service to unserved areas. In this respect, there is a

---

<sup>26</sup> *Id.*

tension between this criterion and criterion 2 above, which seems to reward competition, as opposed to new service to unserved areas.

Reading these two criteria together, an applicant would seem well-advised to propose a project that offers competition to incumbents in parts of its service area and extends service to areas without broadband service in other parts of its service area.

4. Priority will be given to applicants that are borrowers or former borrowers under Title II of the Rural Electrification Act of 1936, 7 U.S.C. § 921 *et seq.* (“REA”), and for project applications that include such borrowers or former borrowers. Title II of the REA deals with the RUS’s longstanding loan program for rural telephone service. Most Title II REA loan recipients are RLECs that are small, private rural telephone companies and, to a lesser degree, telephone co-ops. Because very few municipal utilities are current or former Title II REA loan recipients, this criterion will work against them. To the extent that a municipal broadband provider can team with such an REA-recipient RLEC or co-op, however, it could take advantage of this criterion.
5. Priority will be given to applications that demonstrate that, if approved, all project elements will be fully funded.
6. Priority will be given to applications for activities that can be completed if the requested funds are awarded. In other words, RUS will not favor requests to fund partial projects.

7. Priority will be given to applications for activities that can commence promptly following approval. In other words, shovel-ready projects will receive preference.
8. No area of a project funded with amounts made available from the RUS broadband program may receive grant funding under the NTIA's BTOP.

The RUS criteria are in some ways more restrictive than the BTOP criteria. They clearly focus more on rural areas.<sup>27</sup> The RUS program's preference for Title II REA borrowers also is far more limiting, especially for municipal utilities, than the BTOP factors.

At the same time, much like the BTOP criteria, there is considerable flexibility built into the RUS criteria. And also like the BTOP grant criteria, the RUS grant criteria are, in some aspects, at odds with one another. That is, they point in different directions. The best example is, on the one hand, the preferences given to new competitive broadband services, and on the other hand, the preferences given to incumbent Title II REA borrowers and to provision of service to unserved areas, where by definition there will be no competition.

Unlike the case with NTIA's BTOP, the RUS will not conduct a rulemaking to flesh out the RUS grant program criteria but will instead rely on its existing rural telephone loan and grant program as the procedural overlay for the new broadband grant program. RUS will, however, likely provide additional guidance on the program. Trade press reports have suggested that applicants might need to be ready to file by May 1.

---

<sup>27</sup> Title II of REA defines a "rural area" as "any area of the United States not included within the boundaries of any incorporated and unincorporated city, village, or borough having a population in excess of 5,000 inhabitants." 7 U.S.C. § 924(b).



One of the concerns about having RUS, as opposed to NTIA, administer part of the ARRA's broadband grant program is that RUS's current grant program has a reputation for being burdensome and complicated for applicants, and for being slow in awarding grants. The ARRA attempts to solve this program by requiring the Agriculture Secretary to submit a report to Congress on the new RUS broadband grant program within 90 days of ARRA enactment (*i.e.*, by May 18), and quarterly thereafter until all grant funds are awarded.<sup>28</sup> But the built-in restrictions on Title II REA borrowers and the preference that ARRA gives them will likely remain a substantial obstacle for non-RLECs in applying for RUS broadband grants.

### **III. MUNICIPAL BOND AND OTHER POTENTIALLY BROADBAND-RELATED PROVISIONS IN THE ARRA.**

The ARRA contains other provisions beyond the NTIA and RUS broadband grant programs that could prove beneficial to municipal broadband deployment. We summarize a few of these below.

#### **A. Municipal Financing Provisions.**

Among the many municipal bond and financing provisions in the ARRA, two seem to hold the most potential benefit for broadband financing.

##### **1. Increased Institutional Municipal Bond Holder Deductibility of Interest.**

The ARRA contains the following provisions intended to help "unfreeze" the municipal bond market. To the extent they are successful, the benefits of these provisions extend far beyond municipal broadband financing to municipal financing generally.

---

<sup>28</sup> ARRA, § 5, Div. A, Title I, 155 Cong. Rec. at H1308.

a. “Safe Harbor” for Financial Institutions Holding Municipal Bonds.

The ARRA establishes a new “safe harbor” for financial institutions, allowing them to invest up to 2% of their assets in tax-exempt municipal bonds without having a portion of their interest expense deduction being disallowed.<sup>29</sup> Financial institutions may now deduct 80% for interest on indebtedness related to tax-exempt municipal bonds.<sup>30</sup> The new “safe harbor” will apply, however, only to new money bonds that are issued in 2009 and 2010. *Id.*

b. Increase in the “Small Municipal Bond Issuer” Exemption for Financial Institutions. The ARRA increases the Internal Revenue Code definition for a “small issuer” of municipal bonds from \$10 million to \$30 million for purposes of permitting financial institutions to deduct interest expense allocable to tax-exempt bonds.<sup>31</sup> This increase in the “small issuer” definition only applies, however, to bonds issued in 2009 and 2010. *Id.*

2. Build America Bonds.

The ARRA creates a new type of tax credit bond under the Internal Revenue Code<sup>32</sup> called “Build America Bonds.”<sup>33</sup> Under this arrangement, the interest on an otherwise tax-exempt bond is taxable to bond holders, but the holders also receive a federal tax credit equal to 35% of that interest.<sup>34</sup> The tax credit may be “stripped,” or separately traded, from the bond.

---

<sup>29</sup> ARRA, § 2, Div. A, Title XVI, Div. B, Title I, Subtitle F, Part I, § 1501, 155 Cong. Rec. at H1370 (new 26 U.S.C. § 265(b)(7)).

<sup>30</sup> *Id.* See also Confer. Report, 155 Cong. Rec. at H1458.

<sup>31</sup> *Id.* at § 1502, 155 Cong. Rec. at H1370. See also Confer. Report, 155 Cong. Rec. at H1458.

<sup>32</sup> 26 U.S.C. § 54AA.

<sup>33</sup> ARRA, § 2, Div. A, Title XVI, Div. B, Title I, Subtitle F, Part III, § 1531, 155 Cong. Rec. at H1371.

<sup>34</sup> *Id.* See also Confer. Report, 155 Cong. Rec. at H1463.

Build America Bonds may be used only for purposes that qualify for tax-exempt treatment under present law. In addition, the proceeds of the bonds may be used only for capital expenditures and bond issuance costs, as well as to fund reserves.

B. Smart Grid Grants.

The ARRA furnishes the Energy Department with \$4.5 billion for promoting electricity delivery and energy reliability,<sup>35</sup> a portion of which can be used for grants for smart grid demonstration projects.<sup>36</sup> Municipal, co-op and investor-owned utilities are eligible for the grants, and the grants will be 50% federal matching grants. DOE must award grants for projects “in urban, suburban, tribal, and rural areas.” *Id.* The grants can be used for demonstration projects focusing on advanced technologies, using open protocols and standards, and for reimbursement of the cost of purchasing and deploying smart grid capital equipment and appliances.

The Energy Department is required to establish the procedures for the smart grid grant program within 60 days of ARRA enactment (*i.e.*, by April 18). *Id.*

**CONCLUSION**

The ARRA is a lengthy and detailed piece of legislation. We have attempted here only to provide a preliminary overview of the ARRA’s broadband-related provisions. There are no doubt many other provisions of the ARRA that will be of interest to you. If you would like us to address other ARRA provisions, or provide more in-depth analysis of the ARRA provisions described here, please let us know.

---

<sup>35</sup> ARRA, § 5, Div. A., Title IV, 155 Cong. Rec. at H1313.

<sup>36</sup> ARRA, § 5, Div. A, Title IV, § 405, 155 Cong. Rec. at H1315.

A final note with respect to the ARRA's NTIA and RUS broadband grant provisions:  
The details of the grant application process for each program remain to be developed. We will endeavor to keep you apprised of those details. Further, if you wish to make *ex parte* presentations to the NTIA to influence the BTOP grant application requirements and procedures that the NTIA ultimately adopts, feel free to contact us.